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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Cross Petitioner,

v.

JOHN SALORIO, ROBERT COE and JOHN D. McGARR, JR.,

Cross Respondents.

On Cross Petition for Writ of Certiorari to the Supreme Court of New Jersey

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Questions Presented

1. Is the New Jersey Emergency Transportation Tax Act properly designed to impose a fair share of the costs incurred by New Jersey in the operation of interstate transportation facilities upon nonresidents who directly benefit from those facilities and thus consistent with the requirements of Article IV of the Privileges and Immunities Clause of the United States Constitution?

2. Can two states enter into an agreement to coordinate their laws relating to the taxation of individuals who work in one of the states and reside in the other without securing congressional approval pursuant to the Compact Clause of the United States Constitution (Art. I, §10, cl. 3)?

3. Is the objective of the Privileges and Immunities Clause of Article IV of the United States Constitution of maintaining harmonious interstate relations satisfied by the 1962 agreement between the States of New York and New Jersey which establishes a system for the coordination of the tax laws of the two states by which tax revenues from individuals who reside in one state and earn their income in the other are equitably apportioned while the imposition of double taxation is avoided?

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The cross petitioner, Sidney Glaser, respectfully prays that a writ of certiorari issue to review the opinion and order of the Supreme Court of New Jersey entered on March 26, 1980.

Opinion Below

The opinion of the Supreme Court of New Jersey has been officially reported in 82 N.J. 482 and also is reproduced in Appendix A to the appellants' jurisdictional statement on the appeal of this matter (*Salorio* v. *Glaser*, United States Supreme Court Docket No. 79-2026). The opinion of the Superior Court of New Jersey, Chancery Division, which is not officially reported, has been reproduced in Appendix B to the appellants' jurisdictional statement.

Jurisdiction

The opinion and order of the Supreme Court of New Jersey which is the subject of this cross petition was issued on March 26, 1980. On June 24, 1980, the cross petitioner applied for an extension of time within which to file this cross petition. This application was granted on June 25, 1980 by order of Mr. Justice Brennan extending the time to file this cross petition until July 24, 1980.

Although the cross petition invokes the jurisdiction of the Court pursuant to 28 U.S.C. §1257(3), it is the position of the cross petitioner, for the reasons set forth in Point I of his motion to dismiss the appeal filed by appellants-cross respondents, that the opinion and order of the Supreme Court of New Jersey is not a final judgment for the purposes of conferring jurisdiction upon the Court pursuant to 28 U.S.C. §1257. However, if the Court concludes that those parts of the case decided by the Supreme Court of New Jersey are sufficiently separate and distinct from that part remanded so as to be characterized as final, it is submitted that that conclusion necessarily would extend to the questions which the cross

petitioner seeks to have reviewed. In fact, although the Privileges and Immunities claim on which the appellants-cross respondents seek to appeal is the same issue as is the subject of the remand, the claims of the cross petitioner that the 1962 agreement between New York and New Jersey is enforceable against the appellants-cross respondents even though it did not receive congressional approval and that this agreement requires the Emergency Transportation Tax Act (hereinafter referred to as the "ETT") to be sustained are not involved in the remand. Therefore, the arguments that the Supreme Court of New Jersey's rejection of these claims is a final judgment are, if anything, stronger than the finality arguments presented by the appellants-cross respondents in their Jurisdictional Statement.

Statutory and Constitutional Provisions Involved

New Jersey Emergency Transportation Tax Act, N.J.S.A. 54:8A-1 to 57.

Reported in Appendix C to Jurisdictional Statement.

United States Constitution, Art. IV, §2, cl. 1.

> "The Citizens of each State shall be entitled to all Priviliges and Immunities of Citizens in the several States."

United States Constitution, Art. I, §10, cl. 3.

> "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . ."

Statement of the Case

The general procedural history of the case and the facts material to the issues presented by this cross petition are set forth in the Statement of the Case in the motion to dismiss.

The claim that the ETT is properly designed to impose upon nonresidents a fair share of the costs of interstate transportation facilities was raised in paragraph 4 of cross petitioner's answer and in his brief in opposition to cross respondents' summary judgment motion dated October 28, 1977 at page 21, *et seq.* The contention was accepted by the trial court (see App. B at 51-55) but, as more fully discussed in the motion to dismiss, the Supreme Court of New Jersey has concluded that a plenary trial must be conducted to properly evaluate this claim (App. A at 17-27).

The claim that the agreement between New York and New Jersey is invalid because not entered into in conformity with the Compact Clause of the United States Constitution (Art. I, §10, cl. 3) was raised by cross respondents by letter dated March 10, 1978 to the trial court. This argument was explicitly rejected by the trial court (App. B at 56). Although cross respondents seemingly abandoned this claim in their appellate brief, the Supreme Court of New Jersey nonetheless held that the 1962 agreement could not be relied upon in defending the ETT because it was not entered into in conformity with the Compact Clause (App. A at 27-31). The issue was therefore expressly passed upon by the State's highest court and may be reviewed by the Court. *Raley* v. *Ohio,* 360 U.S. 423, 436 (1959).

The claim that the 1962 agreement between the states satisfies the obligations of the Privileges and Immunities Clause was explicitly raised by the cross petitioner in its

reply memorandum to the trial court dated February 17, 1978 at page 22, *et seq.* This argument was accepted by the trial court (App. B at 56-57). However, the Supreme Court of New Jersey did not reach this issue because it ruled, as noted in the preceding paragraph, that the agreement was invalid because not entered into in conformity with the Compact Clause. Under these circumstances the Court normally will decline to consider an issue as a matter of policy and instead remand the case for initial consideration of the issue by the lower court, but this restriction is not jurisdictional in nature and thus the Court may reach the issue if it is deemed appropriate. See *N.L.R.B.* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 163-164 (1975).

REASONS FOR GRANTING THE WRIT

POINT I

If the Court notes probable jurisdiction to consider the claim of the appellants-cross respondents that the Emergency Transporation Tax Act violates the Privileges and Immunities Clause of Article IV of the United States Constitution, it should grant the cross petition in order to be able to review the entire case.

As indicated in the motion to dismiss, it is the position of the cross petitioner that the remand order from which the appeal and cross petition have been taken is not a final judgment subject to appeal pursuant to 28 U.S.C. §1257. Furthermore, even if the remand order could be characterized as final, the cross petitioner also urges that the decision of the Supreme Court of New Jersey, that the existing record is inadequate, does not

present a substantial constitutional question warranting review by the Court. However, in the event the Court finds the remand order to be a final judgment and concludes that the case presents a substantial constitutional question in its present procedural posture, it is imperative that the Court consider the entire case rather than solely the portion of the case which would be placed before it by the appeal.

Since the Supreme Court of New Jersey remanded the case for further proceedings, the sole effect of an affirmance of the order sought to be appealed would be to permit the proceedings on remand to go forward. For the Court to review the trial court's determination that the constitutionality of the ETT can be upheld based upon the existing record the Court also would have to grant the cross petition.

It also should be noted that the record and case authority upon which the cross petitioner would rely in urging that the validity of the ETT can be upheld on the existing record is the same as that which will be relied upon by the appellants-cross respondents. Therefore, it would require no greater expenditure of resources of the Court or the parties if the Court also grants the cross petition in the event probable jurisdiction is noted.

Furthermore, the existing record provides a sufficient foundation upon which the constitutionality of the ETT can be sustained. The record developed before the trial court contains competent proof that nonresidents receive a direct benefit from the tax and that the tax burden upon those nonresidents is not unreasonable. The record shows that nonresidents who work in New Jersey impose a substantial burden on the State's transportation system, that New Jersey incurs substantial costs in the construction and maintenance of that system and that without the ETT

nonresidents would not pay their fair share of those costs. The record also shows that there is no inequity in the taxes generally paid by nonresidents under the ETT compared with the overall taxes paid by New Jersey residents. In short, it is the position of the State that there is ample credible evidence in the record to support the trial court's conclusion that the taxes imposed upon nonresidents by the ETT are fairly related to the benefits they derive from New Jersey. Consequently, if probable jurisdiction is noted the Court should also have before it the arguments which support the appellee's-cross petitioner's position that the ETT is consistent with the requirements of the Privileges and Immunities Clause of Article IV.

POINT II

The decision of the Supreme Court of New Jersey, that the 1962 Agreement between New York and New Jersey is unenforceable against the cross respondents because it did not receive congressional approval pursuant to Article I, §10, Cl. 3 of the United States Constitution, is irreconcilable with the Court's decision in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U. S. 452 (1978).

In *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452 (1978), the Court squarely held that reciprocal legislation between two or more states providing for the apportionment or allocation of taxes payable by taxpayers with multi-state contacts may be validly enacted without the consent of Congress pursuant to the Compact Clause of the United States Constitution (Art. I, §10, cl. 3). The compact which was upheld was remarkably similar in subject matter and purposes to the

accord at issue here. Both agreements seek interstate coordination of tax policy toward taxpayers with ties to more than one state, in the interests of equity and convenience. Specifically, the four stated purposes of the Multistate Tax Compact are equally applicable to the 1962 Accord: equitable apportionment uniformity, convenience, and the avoiding of duplicative tax liability. *Id.* at 456.

The Court in *United States Steel Corp.* v. *Multistate Tax Commission* reiterated the established doctrine that the strictures of the Compact Clause apply only to those interstate agreements that transfer state sovereignty *"in a way that encroaches upon the supremacy of the United States."* *Id.* at 472 (emphasis added). The Court found that an agreement by which the states seek to coordinate the operation of their tax laws with respect to taxpayers with multistate contacts does not in any way encroach upon the sovereignty of the United States and therefore does not require congressional approval. In light of the close similarities in purpose and effect between the Compact upheld in *United States Steel Corp.* v. *Multistate Tax Commission, supra,* and the 1962 Accord between New York and New Jersey, the Supreme Court of New Jersey should have recognized that the 1962 Accord could be fully effective without congressional approval.

However, in holding that because ". . . no [congressional] approval was given, the Accord cannot be relied on by the State here as an enforceable agreement", the court confused the question whether New York is free to withdraw from the 1962 agreement (which it has never done) with the question whether the agreement is binding upon taxpayers such as the cross respondents so long as it remains in effect. The power of New York to withdraw from the 1962 Accord is not in issue in this case. Rather, the question is whether the agreement is bind-

ing upon taxpayers so long as it remains in effect. And on this latter question, the Court in *United States Steel Corp.* v. *Multistate Tax Commission* squarely held that two or more states may enter into an agreement relating to the apportionment of tax revenues which would be binding upon taxpayers without securing congressional approval. See also, *Bode* v. *Barrett,* 344 U.S. 583, 586 (1953) (Illinois highway use tax exemption for nonresidents does not require congressional approval where the states of the nonresidents reciprocally grant similar tax exemptions to citizens of Illinois). Therefore, the Supreme Court of New Jersey was simply wrong in concluding that the 1962 Accord is unenforceable against the cross respondents because not enacted in conformity with the Compact Clause.

POINT III

The Emergency Transportation Tax is consistent with the principles of federalism which the Privileges and Immunities Clause of Article IV is designed to serve, because it is imposed and collected pursuant to a 1962 Agreement between the states of New York and New Jersey which provides for the coordination of the tax laws of the two states by equitably apportioning tax revenues from individuals who reside in one state and earn their income in the other while avoiding the imposition of double taxation.

A reciprocal arrangement between two states to fairly allocate the financial burdens of government between citizens who reside in one state and work in the other, without imposing any additional overall tax burden on an individual simply because he chooses to work outside the

state where he resides, is fully consistent with the objectives sought to be achieved by the Privileges and Immunities Clause of Article IV. This provision, ". . . which 'appears in the so-called States' Relations Article, the same Article that embraces the Full Faith and Credit Clause, the Extradition Clause . . . the provisions for the admission of new States, the Territory and Property Clause, and the Guarantee Clause,' *Baldwin* v. *Montana Fish and Game Comm'n,* 436 U.S. 371, 379 (1978), 'establishes a norm of comity.' *Austin* v. *New Hampshire,* 420 U.S. 656, 660 (1975), that is to prevail among the States with respect to their treatment of each other's residents." *Hicklin* v. *Orbeck,* 437 U.S. 518, 523-524 (1978). The opinion of the Court in *Austin* v. *New Hampshire, supra,* reaffirmed the view that the primary purpose of this Clause was the maintenance of proper relations between sovereign states in a federal union:

> "The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." 420 U.S. at 662.

Therefore, while invalidating New Hampshire's unilteral action in imposing a tax on Maine residents—described in *Pennsylvania* v. *New Jersey,* 426 U.S. 660, 662 (1976), as a "beggar-thy-neighbor tax"—the Court was careful to point out that the Privileges and Immunities Clause would not require the invalidation of tax on nonresidents which was part of a reciprocal arrangement between the state of domicile and the state of employment:

> "Neither *Travis* nor the present case should be taken in any way to denigrate the value of re-

> ciprocity in such matters. The evil at which they are aimed is the unilateral imposition of a disadvantage upon nonresidents, not reciprocally favorable treatment of nonresidents by States that coordinate their tax laws." 420 U.S. at 667, n. 12.*

Therefore, it is clear that the Privileges and Immunities Clause of Article IV does not preclude sovereign states in the federal system, each acting in the interests of its own citizens, from entering into agreements which establish a fair system for the imposition of taxes upon citizens with multi-state contacts.

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* The cross respondents have argued previously that this quotation does not support the validity of the ETT because the ETT does not accord them "favorable treatment". This argument is fallacious for several reasons. First, it is strongly arguable that the agreement does assure individuals in cross respondents' situation more favorable tax treatment than they otherwise might receive. Since the State of New York may constitutionally suject cross respondents to tax on the full amount of their income wherever earned (*Lawrence* v. *State Tax Commission*, 286 U.S. 276, 280-281 (1932)) and it is not disputed that cross respondents may be taxed pursuant to the New Jersey Gross Income Tax Act to the full extent of their New Jersey income, cross respondents have an exposure to double taxation on their New Jersey income which the agreement between the states serves to avoid. Furthermore, if the avoidance of possible double taxation is not recognized as "favorable treatment", it is still clear that the ETT does not impose any disadvantage upon cross respondents but rather, at worst, simply has a neutral effect upon them, since the amount of taxes which they pay to New Jersey under the ETT is identical to what they otherwise would be required to pay New York. A reciprocal arrangement which has a neutral effect on the overall tax obligations of a nonresident who works in another state is fully consistent with the principles of federalism which the Privileges and Immunities Clause of Article IV was designed to serve.

The trial court found as a fact that the States of New York and New Jersey had entered into a reciprocal arrangement in 1962 regarding the taxation of individuals who reside in one of the states and work in the other. It found that "[t]here was in 1962 and there continued thereafter an arrangement between the States of New York and New Jersey, their governors and their legislators which accepted as valid the tax situation now being challenged" (App. B at 51); ". . . that the 1962 Accord between the two states and the actions and inactions of the parties thereafter through 1975 represented a reciprocal understanding, compact or the like between the legislative and executive branches of these two states" (App. B at 56); and that "[n]either governor has taken formal action to rescind the limited part of the accord not dependent on legislative action, nor have they even made a statement which would challenge the validity of the arrangement" (App. B at 57).

There is more than sufficient evidence in the record to support the trial court's findings. When New Jersey first enacted the Emergency Transportation Tax Act in 1961, the incidents of the tax fell exclusively upon New Jersey residents. However, New York was apparently dissatisfied with the fiscal consequences of the reciprocal crediting provisions of the ETT and the New York Personal Income Tax, so appropriate steps were initiated to reverse the incidence of the taxes of the respective states. The New York Legislature enacted chapter 2 of the Laws of 1962 by which it repealed the tax credit previously afforded nonresidents for taxes paid to their state of residence and at the same time extended a credit to its own residents for taxes paid to the state in which they work. By chapter 70 of the Laws of 1962, the New Jersey Legislature enacted similar complementary amend-

ments to the ETT. The practical effect of these legislative enactments by the two states was to change the interstate taxing system of New York and New Jersey from one in which each state imposed a tax on its own residents to one in which each state imposed a tax on the residents of the other state who commuted to work in the taxing state.

This reciprocal legislative action by the legislatures of the two states set the essential framework for the May 6, 1962 agreement between Governors Rockefeller and Hughes. Indeed, paragraph 2 of the agreement is simply an announcement by Governor Rockefeller ". . . that New York, *under legislation enacted at the 1962 legislative session,* will allow its residents a credit against their New York State personal income taxes for income taxes paid to New Jersey under the New Jersey Emergency Transportation Tax Act enacted in 1961, as amended" (App. B at 44) (emphasis added). Similarly, paragraph 3 of the agreement announced the intent of Governor Hughes to submit to the New Jersey Legislature the bill which was enacted less than a month later as chapter 70. Complementary to those basic legislative provisions, the remaining paragraphs of the agreement set forth mutual agreements by the states not to participate in contesting the taxes imposed by the two laws and to assist and cooperate in the administration and enforcement of the two laws. Therefore, the 1962 Accord represented a solemn reciprocal undertaking between the legislative and executive branches of the respective states.

Furthermore, this agreement remains intact today. The New York Legislature has not sought to repeal the tax credit extended to its residents for taxes paid to New Jersey. And the New Jersey Legislature has adhered to New Jersey's essential obligation under the 1962 Accord

by continuing in effect the credit afforded its residents for taxes paid to New York. Similarly, neither governor has taken formal action to rescind the limited part of the accord not dependent on legislative action. Therefore, assuming *arguendo* that either state could unilaterally withdraw from the 1962 Accord, the plain fact is that neither state has attempted to do so.

The cross respondents seek to circumvent the provisions of the 1962 Accord by arguing that this case involves individual rights which are beyond the power of the states to address by reciprocal executive and legislative action. However, the Privileges and Immunities Clause is found in Article IV of the Constitution dealing with the relations among states. Therefore, "[t]he primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States." *Toomer* v. *Witsell,* 334 U.S. 385, 395 (1948). The legal import of the 1962 Accord is not that a state in concert with another state may limit the constitutional rights of an individual. Rather, the Accord represents a practical resolution by the legislatures and executives of New York and New Jersey of the problems of taxation of individuals who work in one of the states and reside in the other, without increasing the total tax burden of the cross respondents or any of the other commuters similarly situated. Therefore, if the Court notes probable jurisdiction it also should grant the cross petition in order to consider the effect of the 1962 Accord upon the ETT's conformity with the principles of federalism which the Privileges and Immunities Clause of Article IV was designed to serve.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the cross petition for writ of certiorari should be granted.

Respectfully submitted,

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